

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 11-14968(SHL)

4 Adv. Case No. 12-01054(SHL)

5 - - - - - x

6 In the Matter of:

7

8 553 WEST 174TH ST LLC,

9

10 Debtor.

11 - - - - - x

12 BINDER, ET AL.,

13 Plaintiffs,

14 v.

15 SE OPPORTUNITY FUND, LP, ET AL.,

16 Defendants.

17 - - - - - x

18 U.S. Bankruptcy Court

19 One Bowling Green

20 New York, New York

21

22 November 6, 2013

23 10:04 AM

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1 B E F O R E :

2 HON SEAN H. LANE

3 U.S. BANKRUPTCY JUDGE

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7 Hearing re: Status Conference Regarding Orders Submitted On
8 Special Performance

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10 Hearing re: Adversary - Status Conference Regarding Orders
11 Submitted On Special Performance

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13 Hearing re: Doc. #25 Letter/Pre-Hearing memorandum Filed By
14 Claude Castro On Behalf Of Seth Miller, SE Opportunity Fund,
15 LP

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25 Transcribed by: Dawn South

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1 P R O C E E D I N G S

2 THE COURT: We have two matters on the calendar
3 for 10 o'clock, and something is on for 11:00, but obviously
4 we'll do the 10 o'clock first.

5 And the first case is 553 west 174th, which
6 involves the adversary proceeding, binder versus SE
7 opportunity.

8 So let me get appearances.

9 MR. KLESTADT: Your Honor, good morning, Tracy
10 Klestadt of Klestadt & Winters, along with my partner,
11 Patrick Orr, we represent Bryan Binder. I'm also here with
12 co-counsel, Gary Moss, and Larry Lazar from Moss & Kalish.

13 THE COURT: All right.

14 MR. CASTRO: Good morning, Your Honor, Claude
15 Castro of Claude Castro & Associates for SC Associates and
16 Seth Miller. With me is Abraham Backenroth, bankruptcy
17 counsel.

18 MR. BACKENROTH: Backenroth, Frankel & Krinsky
19 representing the debtor.

20 THE COURT: All right.

21 MR. BACKER: Good morning, Judge, Glenn Backer for
22 Seymour Horowitz (ph).

23 THE COURT: All right. Good to see you all again.
24 Oh, one more?

25 MR. KREIGER: Actually two more appearances.

1 Abraham Kreiger and my partner.

2 MR. LOBELLO: Good morning, Your Honor, Edward
3 LoBello, Meyer, Suozzi, English & Klein for the Tillow
4 Trust, along with my partner Abe Kreiger.

5 THE COURT: All right. Good morning and welcome
6 back for folks I've seen in the previous parts of this case.

7 So this hearing was my idea in light of the
8 proposed order that I received and then the objection that I
9 received. I didn't think it was something that -- that I
10 wanted to wing in terms of putting together the order and
11 going through the objections, so I thought it was productive
12 to hear from the parties.

13 And let me just float an idea that probably is not
14 ultimately a good one but I'll do it any way because it's
15 the first thing that struck me when I read the order --
16 proposed order.

17 The question is whether I need to issue something
18 as specific as what's in there. Because the agreement is
19 the agreement, and so there's also -- sometimes less is
20 more, and there's always a concern, and perhaps
21 coincidentally this came up in the context of looking at a
22 financing order in another large 11, by repeating
23 everything, repeating you run the risk of leaving things out
24 and then the order gets longer and longer and then you have
25 to fight about what it means.

1 That said I think the parties have gone far enough
2 along that whether they agree with me or not, whether they
3 want to appeal or not, all of which is fine and everybody's
4 right to take whatever steps they want, I don't think
5 anybody wants to have unnecessary fights and inefficiency.

6 So that's the two poles and so I'll leave it to
7 the parties and tell me what your views are.

8 MR. KLESTADT: Your Honor, thank you. I will take
9 the initial credit for blame, as the case may be, for the
10 structure of the order.

11 Our thinking was, Your Honor, that given the
12 history of this case we should have an order that was as
13 detailed as possible for the steps of the closing so that we
14 would seek to avoid any further disputes.

15 In this case, Your Honor --

16 THE COURT: No, and that's -- that's one of the
17 two schools, I understand that.

18 MR. KLESTADT: Reaching an agreement has been
19 pulling teeth.

20 So my thought was, Your Honor, to have every step
21 of the closing detailed in the order so that the only thing
22 that the debtor or Mr. Miller had to do was accept money.
23 Everything else would have been spelled out, every step of
24 the closing, any deliverables that we had to provide,
25 everything would be spelled out.

1 Now the counter order of course says no, we'll
2 just go to the closing, and you know, we'll all be on our
3 way.

4 We're concerned, Your Honor, that that's - given
5 the history here that that doesn't work.

6 THE COURT: Right.

7 MR. KLESTADT: All right? So what we tried to do,
8 Your Honor, was to spell out each step of the closing in
9 terms of adjustments, who would get certain funds, et
10 cetera. We can go into some more detail, Your Honor, about
11 the escrow that we have suggested.

12 But, Your Honor, things like the closing costs,
13 the broker's commission, and the various claims that -- Your
14 Honor, this is obviously a very unusual situation given the
15 fact that you've got a bankruptcy case which was filed by
16 the debtor but now my client is going to end up controlling
17 the debtor as a result of the closing. So we wanted to
18 spell out who was going to be paid from what funds.

19 We don't have a plan of reorganization here, Your
20 Honor, nor is one even potentially necessary.

21 THE COURT: Right. This is the case.

22 MR. KLESTADT: We want -- the objective, Your
23 Honor, is for my client to be able to get title to the
24 property, notwithstanding the fact that there's a joint
25 venture agreement, et cetera, get in essence free and clear

1 title to the property, an owner has to be paid monies so
2 that there aren't subsequent claims. Okay.

3 THE COURT: All right. That's fine.

4 Well then let me -- let me move on to the next
5 obviously question then is whether the parties have talked
6 about the order and the objections to the order in terms
7 narrowing whatever disputes that have to come in front of me
8 today.

9 MR. KLESTADT: Well, we have conferred, Your
10 Honor.

11 Yesterday Mr. Castro filed a pleading which
12 there's a sentence in there that says we seem to be in
13 agreement on all points accept for the \$700,000, which is,
14 you know, our position, Your Honor, is that because of the
15 default Mr. Binder is entitled to it. They take a different
16 view.

17 If that's the only issue, Your Honor, with regard
18 to the order we're happy to escrow that as well and then
19 come back to you for a later determination as to whether
20 that's payable, or Your Honor, Mr. Binder may be entitled to
21 a slew of damages resulting from the breach and the three-
22 year delay and the cost that he's incurred, et cetera, et
23 cetera. We can leave that for another day as well, we can
24 put the 700,000 into escrow. If that's the only issue that
25 they have then our order can proceed and we can go to

1 closing.

2 THE COURT: All right.

3 MR. BACKENROTH: Your Honor, the approach of our
4 order is the same approach that is in every case, in every
5 bankruptcy case. You sell a piece of property, those things
6 which are not in dispute are paid, those things which are in
7 dispute are escrowed.

8 Mr. Castro was actually more on top of the closing
9 issues, has been attempting to resolve, to narrow the
10 disputed items as opposed to the undisputed items so that
11 those things can be paid at the closing.

12 However, it's not appropriate in the submission of
13 an order relating to the sale of a property to determine
14 issues which are in dispute as part of the order itself.

15 THE COURT: I -- here's what I want to do. I
16 don't want to get bogged down in speeches, I want to go
17 through the order, right, so let's just do that.

18 But here's what I'm hearing, is that the \$700,000
19 people disagree about what should happen to that. I -- my
20 opinion didn't address that so we're going to table that and
21 everybody reserves their rights to make whatever arguments
22 and we'll figure it out.

23 I -- what I had understood was requested and the
24 trial was about whether one side or the other breached the
25 contract, and from the plaintiff's point of view that the

1 breach would entitle them to specific performance meaning we
2 get the property.

3 So that's what I addressed in the opinion and
4 that's what I understood the order on specific performance
5 addressed.

6 So to the extent that having ruled on liability there
7 may be some unresolved damage questions. Fine, so be it, we
8 can figure that out and I'll take suggestions about how to
9 do that.

10 But it sounds like the first thing that has to
11 happen is for the actual transaction to go through.

12 MR. BACKENROTH: We are -- we are ready for the
13 transaction, but --

14 MR. KLESTADT: Your Honor --

15 MR. BACKENROTH: -- there are some other items --

16 MR. KLESTADT: Excuse me back.

17 THE COURT: Okay.

18 MR. BACKENROTH: There are some other items which
19 are in dispute, they're a very substantial attorneys' fee
20 that is being requested.

21 THE COURT: Yeah, I don't want to talk about --

22 MR. BACKENROTH: And again, I just asked to escrow
23 it. In other words there's no reason to --

24 THE COURT: No, I understand.

25 MR. BACKENROTH: -- reinvent the wheel. That's

1 the way it's done.

2 THE COURT: I don't need a speech on something I
3 already made up my mind about.

4 So here's --

5 MR. KLESTADT: Your Honor?

6 THE COURT: -- what I want to do. Let's go
7 through the order. So --

8 MR. KLESTADT: Your Honor, if I may --

9 THE COURT: Yes, sure.

10 MR. KLESTADT: -- just for purposes of going
11 through the order. One overarching comment or principal if
12 I may.

13 We are looking to get title insurance in
14 connection with the transaction, and the line items that are
15 included in the order are the types of line items that a
16 title insurance company is going to be looking for and the
17 payments that'll be made are the types of things that the
18 title insurance company are going to be looking for. My
19 colleagues can address that in some more detail. But I just
20 want to make Your Honor sensitive to that as we're going
21 through the line items.

22 THE COURT: Well, I think the first thing I threw
23 out was whether I needed to issue an order like this at all,
24 and I said that that's the first thing that came into my
25 head, but then I also said I think probably ultimately that

1 optimism is misplaced in this case given the history between
2 the parties, and I don't say that in a pejorative sense, I
3 just say that it's been a hotly contested case and that's
4 fine, that's why I'm here, and that under the circumstances,
5 and I think the back and forth has only confirmed that it's
6 appropriate, to issue an order that makes clear to everybody
7 where we stand, otherwise I think it'll probably be an
8 inefficient process for everybody involved.

9 So -- so here's what I'd like to do is to just go
10 through the objections to the proposed order that were filed
11 by Mr. Castro a little bit. I'm trying to remember the
12 exact date, I think it was October 9th, and then I think the
13 pleading they filed yesterday was largely about the
14 \$700,000. I think we're going table that and then we'll set
15 a schedule for dealing with that after we get through the
16 order.

17 So I have the order -- proposed order in front of
18 me and I have his objections in front of me, and I think we
19 can safely skip paragraph 1 which is an introduction.

20 So paragraph 2 talks about the second ordered
21 paragraph to the extent that it has the words "as modified
22 herein."

23 I understood as modified herein to be essentially
24 since you're setting forth new dates that are different than
25 the contract this order by necessity does modify the

1 contract because the contract had -- that was one of the
2 disputes about whether time was of the essence and things of
3 that sort, so I understood as modified herein to be saying
4 that this order is essentially a modification of the
5 contract, to the extent that it has to be. So that's how I
6 understood it.

7 So in light of that, I don't know, Mr. Castro, if
8 there's anything that you want to pursue on that point.

9 MR. CASTRO: No, Your Honor, if -- yeah, as Your
10 Honor -- if it's clear that it's a matter of closing and
11 deadlines I have no objection to that.

12 THE COURT: All right. All right. So we'll leave
13 that in.

14 MR. BACKENROTH: Your Honor, perhaps we should
15 state that in the order, that it's a -- it has to do as to
16 deadlines, because --

17 THE COURT: Okay.

18 MR. BACKENROTH: -- when I read it I --

19 THE COURT: Here's what I'd like to do. I want to
20 talk to one person from a party, and I'm happy to have ears
21 by bankruptcy counsel, I'm happy to have you confer, I know
22 Mr. Castro is more than well versed in these matters so I'm
23 happy to hear from whoever. It's just I think probably
24 going to be a little less productive to go back and forth.

25 So if you have proposed language that you'd like

1 to insert I'm open to suggestions.

2 So first I'm looking for as modified herein and I
3 see --

4 MR. CASTRO: Your Honor, I would suggest if I may,
5 that the modification should be limited to deadlines such as
6 closing dates to make sure that there are no substantive
7 modifications to the agreement.

8 THE COURT: Well, you know, I want -- when I say
9 suggestions I want language and you tell me where the
10 language goes and that that's -- that's when I mean
11 suggestions, that's what I want.

12 MR. CASTRO: All right.

13 THE COURT: So I'm looking for the second -- so
14 the second ordered paragraph says "shall perform under
15 certain joint venture agreement dated October 8th as
16 modified herein." I mean the only thing the order does is
17 have dates and details.

18 So since the order is an order I'm having -- I'm
19 having trouble seeing as how there's any need to narrow it
20 any further, because otherwise, right, the order does what
21 it does. So --

22 MR. CASTRO: Your Honor, may I suggest --

23 THE COURT: How about -- how about this. I won't
24 use modified. Perform under that certain joint venture
25 agreement dated October 8th, 2010 --

1 MR. CASTRO: May I suggest as enforced herein?

2 THE COURT: I really think we're rearranging the
3 deck chairs on the Titanic a bit, but --

4 (Laughter)

5 THE COURT: -- I'm just --

6 MR. CASTRO: As provided herein, Your Honor?

7 THE COURT: I'm just going to say and this order.

8 MR. CASTRO: Okay.

9 THE COURT: Perform under that certain joint
10 venture agreement and this order, which is -- it's the same
11 thing, but that's fine. It's different words.

12 All right. So the next paragraph 3 complains the
13 second ordered paragraph should be deleted because it
14 conflicts with the ordered paragraph.

15 What is it that should be -- provides that a
16 closing date may be accelerated.

17 MR. CASTRO: In other words, Your Honor, the
18 paragraph before that provides for a closing date seven days
19 from the date of the order or seven days after the order
20 becomes non-appealable. And then the following order gives
21 Mr. Binder the ability to accelerate.

22 THE COURT: All right. Let me hear from --

23 MR. KLESTADT: All right. Well, Your Honor, a
24 couple things.

25 Number one the dates now have to be changed. We,

1 you know, had submitted this --

2 THE COURT: Right.

3 MR. KLESTADT: -- some time ago and we're now
4 going to start -- depending upon where we are we're going to
5 start running into the holidays, et cetera, I'm going to
6 have to Mr. Binder to (indiscernible - 00:14:52) on a date
7 to close.

8 THE COURT: Right. Well, here's the thing.

9 MR. KLESTADT: But --

10 THE COURT: My concern about that paragraph though
11 is that it requires cooperation, and that is not something
12 that has been a hallmark of the parties' relationship here.
13 So I'm a little worried that that paragraph will mean that
14 we end up back here. So I'd rather set a date. And so I'm
15 open to a date, figuring out a date now so when we have the
16 prior paragraph on the later or whatever date or seven days
17 from this order becomes final and non-appealable. So --
18 because I'm just concerned about accelerating the closing
19 date that people will say well, it's accelerated and we
20 don't agree because I just again think that that's --

21 MR. KLESTADT: Your Honor, what this was intended
22 to address was trying to close, if you will, on the first --
23 within a reasonable time after the order became final and
24 non-appeal. I don't know whether plaintiff -- excuse me --
25 the defendant is going to appeal the order. We then have a

1 different set of considerations in terms --

2 THE COURT: Right. Well, I have no problem with
3 saying that it's got to be within seven days after the order
4 becomes final and non-appealable. I mean let's set that
5 date. I mean I just want to have a date.

6 MR. KLESTADT: Well, Your Honor, we may decide to
7 -- we may want to close and take the risk because they
8 haven't received a stay pending appeal.

9 THE COURT: Right.

10 MR. KLESTADT: So that's why, you know, we had to
11 have the alternative mechanism.

12 THE COURT: Well, but I think if you say you're --
13 you say you want to close seven days after it becomes final
14 appealable -- non-appealable -- well, I see what you're
15 saying.

16 MR. KLESTADT: Yeah. If they appeal without a
17 stay we can still decide to close and take the risk.

18 THE COURT: Well then fix the prior paragraph and
19 not make it the later of. How about to say the earlier of a
20 particular date or seven days after it's non-appealable?

21 MR. KLESTADT: I think that works.

22 THE COURT: All right. So the prior paragraph
23 will say the earlier of --

24 MR. KLESTADT: Your Honor, can I have a moment?

25 THE COURT: Sure.

1 (Pause)

2 MR. MOSS: Your Honor, my name is Gary Moss.

3 I don't understand their position, because we're
4 contemplating closing -- accelerating the closing to a date
5 in the second decretal paragraph that we're talking about,
6 and that will take the burden of paying all the expenses
7 associated with the property off their shoulders. We want
8 that discretion.

9 THE COURT: Well here's -- here's my problem. You
10 say accelerate the closing to a new date. When I read that
11 I see new date, and what I envision is a call to chambers or
12 an email to chambers saying we don't agree with the date,
13 they're trying to improperly pick a date, we don't agree
14 with that date.

15 I understand as a matter of the transaction what
16 the intent is and what it may -- may result in.

17 My concern is that -- is that a new date won't
18 lead to an objection, it will lead to more litigation and
19 more arguments and another hearing. That's my concern.

20 MR. MOSS: Our view is that if they do appeal this
21 this can drag on for many, many months.

22 THE COURT: Yeah, but let's just set a date for
23 closing then. If the --

24 MR. MOSS: But that would --

25 THE COURT: -- you say -- so here's my concern.

1 It is Monday, the closing is supposed to happen in 14 days.
2 Under this paragraph Mr. Binder, in his sole discretion,
3 decides to accelerate it to the following Monday, they say
4 they're not available. You say it's our sole discretion
5 we've set it. They say, well, our client is not available,
6 we're not coming. Someone picks up the phone, calls me and
7 says, no, first I'll write a letter. And I get one letter
8 then I get two letters, then I get a memorandum. I'm not
9 doing that.

10 So I understand what you're trying to do, but
11 anything that is subject to a possible dispute I suspect
12 will become an actual dispute.

13 MR. MOSS: Okay. But if you make it the earlier
14 of --

15 THE COURT: All right.

16 MR. MOSS: -- and that forces us to close then we
17 have title issues.

18 THE COURT: All right. That's fine.

19 MR. MOSS: The title company won't --

20 THE COURT: Then we'll leave that as it is. My
21 concern is the ability to pick a new date that will be the
22 subject of a dispute.

23 MR. MOSS: We can put in a reasonable notice by
24 agreement of the parties.

25 THE COURT: I think that's how we ended up here in

1 the first place isn't it? Right? I mean I think that's the
2 trial.

3 So again, I just --

4 MR. KLESTADT: Your Honor --

5 THE COURT: -- the one thing I think everybody can
6 agree upon is that this should be one stop shopping, and
7 while the parties will not -- may not be happy with it they
8 will agree that they're really just not going to have to
9 look at each other again for the most part, so that's my
10 concern.

11 MR. KLESTADT: Your Honor, the simplest is to
12 delete that paragraph with the discretion, right?

13 THE COURT: Yeah.

14 MR. KLESTADT: Okay.

15 THE COURT: I mean if that would -- that would
16 resolve my concern.

17 MR. KLESTADT: And that's -- we would agree to
18 that.

19 THE COURT: And if that -- if that means that you
20 want to pitch a date in the prior paragraph --

21 MR. KLESTADT: And I think --

22 THE COURT: -- that's a little earlier than you
23 might have otherwise because we've had some time that it's
24 taken to get here.

25 MR. KLESTADT: What I'll suggest, Your Honor,

1 instead of November 1st, 2013, January 15th or January 31st
2 of 2014 given the holidays, the entry of the order, explain
3 it to the title company, et cetera.

4 THE COURT: Okay. So what date do you want?

5 MR. KLESTADT: January 31st, 2014.

6 THE COURT: All right. This is all subject to
7 parties agreeing obviously to if you agree to make a change
8 and say we want to do that sooner. Someone mentioned
9 closing costs and that there'd be some benefit, why would
10 they object? That's fine, you can always do it by
11 agreement. But that means that it's not subject to dispute.
12 All right.

13 MR. CASTRO: Your Honor, if I may, two issues.

14 I'd like some language to confirm that we will get
15 an updated title report.

16 THE COURT: Okay. I'm going through your
17 objection --

18 MR. CASTRO: Okay.

19 THE COURT: -- we're doing that first and then
20 I'll address any other issues.

21 MR. CASTRO: And the other issue that we have to
22 address, Your Honor, we have a mortgage that came due
23 November 1st and we're pushing this closing to January 31st.

24 THE COURT: What do you want me to do about it?
25 You made objections, I couldn't decide them without hearing

1 from the parties, I had to get the parties in. Since that
2 happened the City Opera case filed here, and the Atlantic --

3 MR. CASTRO: Okay.

4 THE COURT: -- Express case filed here, I've had a
5 few other things to do. We're here now, we're going to pick
6 a date.

7 MR. CASTRO: Okay.

8 THE COURT: Somebody won, somebody lost, this is
9 an order to make the contract go forward.

10 So you want to work out something separately none
11 of this is abar to doing that, but this is designed to work
12 if no one reaches any agreement.

13 MR. CASTRO: Okay.

14 THE COURT: All right. So moving right along. I
15 think we're up to the objection paragraph 4 talking about
16 the entire balance of the purchase price being paid to
17 Backenroth, Frankel & Krinsky and escrow should be in
18 accordance with the JV agreement as opposed to setting forth
19 who the money should go to.

20 So let me hear from --

21 MR. KLESTADT: All right, Your Honor, the
22 intention here is the following.

23 As I said earlier, my client may have claim for
24 damages against SE Opportunity Fund, which is the joint
25 venture party. All right? There's a bankruptcy case

1 pending. Those funds are going to -- the claims, including
2 my client's claim, we have a proof of claim on file, will
3 have to be addressed. The funds should not go into a debtor
4 in possession account for any use. This debtor has no
5 business other than, you know, the -- you know, the
6 circumstances that we're involved with here.

7 The funds should be deposited into Mr.
8 Backenroth's escrow account for -- you know, subject to
9 disposition by further order of the Bankruptcy Court once
10 the claims against the debtor are adjudicated.

11 THE COURT: Well, I think as I understand the
12 objection is that it's to the fact that it spells out so
13 much is supposed to go to the Tillow Trust, so much is
14 supposed to go to --

15 MR. KLESTADT: That's right. In other words any
16 after the closing costs are paid, amounts for the title
17 company, amounts for Mr. Tillow, real estate taxes, whatever
18 they are, whatever the residual is should then go in
19 Mr. Backenroth's escrow pending further order of the
20 Bankruptcy Court.

21 MR. CASTRO: Your Honor, if I may address that.

22 THE COURT: Sure.

23 MR. CASTRO: For example, on their Exhibit A under
24 closing costs they have an amount to First American Title
25 for \$163,829.96.

1 We had a conference call between myself,
2 Mr. Lazar, and a representative of the First American Title
3 Insurance Company, because I didn't understand what that
4 covered. To the extent there are real estate taxes
5 obviously those have to be paid and we've asked for an
6 update. But what we were told is that they want a transfer
7 tax of \$121,000.

8 Now I spoke again to the representative of First
9 American and reminded him, which he told me he was not aware
10 of, that the transfer tax was paid when the property was
11 sold by Mr. Tillow.

12 THE COURT: Well let me ask you a question. Is --
13 when you say First American Title Insurance Company the
14 checks to be written at closing have two entries for that.
15 The first is a specified amount of \$163,829.96. The second
16 says, "Bank check payable to First American Title Insurance
17 Company, the same entity, and then it says, "To be
18 determined."

19 Is what you're talking about under 2 or under 3?

20 MR. CASTRO: Under 1, Your Honor.

21 That 163,000 that's broken down is 121- and 18-,
22 these are transfer taxes. And the transfer taxes have
23 already been paid on this transaction when the building was
24 sold by Mr. Tillow to 153. There is, as far as we know, no
25 basis for paying another transfer tax on this transaction.

1 More importantly, this transaction has already
2 been insured by another title company, and what we suggest
3 on doing is simply getting that title company, which already
4 insured the transfer of the deed, to --

5 THE COURT: Have the parties had this
6 conversation? Because I got to say I add no --

7 MR. CASTRO: We spoke. We spoke.

8 THE COURT: -- value added. So where are we on
9 this?

10 MR. KLESTADT: Your Honor, First American is a
11 reputable title company, they're taking the position that in
12 order to issue a title policy the transfer tax is payable.

13 Mr. Castro thinks that it's not payable that it's
14 duplicative they can apply for a refund. But for my client
15 to get a title policy this amount has to be paid.

16 THE COURT: Are you representing First American
17 Title says this is the way it has to be done or the
18 transaction can't close?

19 MR. KLESTADT: Your Honor, I have a copy of the
20 title -- of the invoice with the items listed from First
21 American, this is what they were going require.

22 THE COURT: All right.

23 MR. CASTRO: Yeah, but I spoke to the
24 representative yesterday.

25 THE COURT: Okay. If you can work out some deal

1 that's less than that that's fine. If that's a
2 representation about what it's going to take to close your
3 client doesn't get a chance to go to trial and then have it
4 adjudicated and say this specific insurance is required and
5 then decide what that looks like.

6 If you can work out something and say this is too
7 much, it's been handled this way, it's been handled that way
8 and you can do it to everybody's satisfaction that's fine.

9 First American Title I think was the company that
10 handled --

11 MR. CASTRO: No.

12 THE COURT: -- the initial transaction?

13 MR. CASTRO: No.

14 THE COURT: No?

15 MR. CASTRO: That's the point, Your Honor. We had
16 Madison Abstract. They've already insured title.

17 MR. KLESTADT: Your Honor --

18 THE COURT: I know, but you don't -- you don't get
19 to dictate how this closes. Your client went to trial and
20 lost. And so they are going to close this transaction if
21 it's reasonable, if they're using First American Title
22 they're using First American Title.

23 MR. CASTRO: But, Your Honor, I --

24 THE COURT: You can work out something. Maybe you
25 say well, we can get the money back ask you'll get a certain

1 percentage of it, we'll get a certain percentage of it.

2 Fine, that's fine. This is the danger of having me involved
3 in this kind of detail.

4 MR. CASTRO: I agree. But Judge, I spoke to
5 Mr. Bergman (ph) at First American yesterday after we had a
6 conference call. I told him did you know that --

7 THE COURT: Well then work it out. Then work it
8 out and give me something --

9 MR. CASTRO: That's my point, I want to work it
10 out, but --

11 THE COURT: No, but you are not going to work it
12 out through me.

13 MR. CASTRO: I'm not trying to.

14 THE COURT: If you have a conversation and you get
15 -- can I see the letter from First American? I mean this is
16 ridiculous that I'm spending time on this.

17 MR. CASTRO: No, this is an invoice.

18 THE COURT: I've got -- I know, but that's why --
19 that's why I asked whether it's being represented that First
20 American say this is what it needs to close.

21 MR. CASTRO: But they're being told that they're
22 insuring title for the first time. We're not selling real
23 estate, Judge, we're transferring interests in an LLC.

24 THE COURT: I don't care. If you work out
25 something where it can be done cheaper fine. I have

1 adjudicated this, the transaction has to close, this is one
2 of the risks you take, so be it. If you work out something
3 that is cheaper and acceptable to all parties, because after
4 all that's the tierney of the Bankruptcy Court. Money
5 talks. So if you work out something that's cheaper and
6 everybody benefits I'm sure you'll be able to work something
7 out. If you can't then you can't, then there's no
8 agreement.

9 This is a -- this is a reputable title company,
10 that's who they're using to close, that's who you use to
11 close. There's no allegation that they're getting the
12 money, the money is going to First American so be it. It is
13 what it is.

14 If you figure out something that is cheaper and
15 everybody benefits then I'm sure you can -- you can amend
16 this or figure some other way to --

17 MR. CASTRO: Your Honor, what I suggested is that
18 this money be held in escrow. I'm not suggesting that we
19 get the money. That it be held in escrow and let us address
20 that issue. If it --

21 THE COURT: If the money is being paid to First
22 American to close how can it be held in escrow and have the
23 transaction close?

24 MR. CASTRO: Because, Your Honor, the transaction,
25 all it requires is for the assignment of the interests.

1 We're not selling real estate.

2 THE COURT: You're telling me what the title
3 company has to do. He says one thing, you say another.
4 It's a reputable title company, it's chosen. You want to
5 work out a better, cheaper solution fine.

6 MR. CASTRO: But can I -- may I bring my title
7 company, Your Honor, they already insured this.

8 THE COURT: I'm done. I'm done. This order is
9 fine. If you want to work out something that's better and
10 you want to amend it fine.

11 Next -- that objection is overruled.

12 MR. CASTRO: Your Honor, are we making -- if I may
13 just for the record. Are we making First American the sole
14 arbit (sic) of this issue? They may be wrong. And I
15 think --

16 THE COURT: I have been -- it has been represented
17 to me to be very clear that First American is the title
18 company to be used by the plaintiff here, Mr. Binder to
19 close a transaction that I found in an opinion and decision
20 that the plaintiffs are entitled to specific performance.
21 Your client, who lost that decision after a trial, does not
22 get to dictate how specific performance should be
23 accomplished.

24 I am hearing your objections, I'm agreeing with
25 some of them, I'm disagreeing with this one. I'm

1 disagreeing with this one because First American -- it's
2 represented to me First American needs this amount of money
3 that's accounted for in this order under the breakdown to
4 close.

5 As I said now for the third and for the last time,
6 because we're done with this, if you reach a conclusion or
7 an alternative that is cheaper for all the parties that
8 everyone agrees to I am fine with that. But this particular
9 dispute, like pretty much everything else in this case, has
10 not been the subject of any agreement, which is why we spent
11 a considerable amount of time in this very courtroom on this
12 case.

13 So that's it. If you want to work out something
14 that's cheaper fine. If you don't I'm going with First
15 American, it's a reputable title company. And based on the
16 representation given to me that this is what it's going to
17 take to close the transaction. That's what's going to be in
18 there, so.

19 MR. CASTRO: Your Honor, if I may just for the
20 record. Because --

21 THE COURT: No.

22 MR. CASTRO: -- they --

23 THE COURT: No. We've spent ten minutes on this
24 now, I have a whole courtroom for 11 o'clock, I've got a
25 courtroom from 2 o'clock. No, there's no more to talk

1 about.

2 So the fourth ordered paragraph, that objection is
3 overruled.

4 The fifth ordered paragraph is about the \$700,000
5 escrow. That \$700,000 escrow will be the subject of further
6 proceedings as necessary in terms of where that money should
7 go. It should be held in escrow. Is there any dispute
8 about how it should be held in escrow? I hesitate to ask.

9 MR. KLESTADT: Well, Your Honor, it's going to be
10 held with Mr. Backenroth, and that's fine.

11 THE COURT: All right. Is that acceptable?

12 MR. CASTRO: Yes, Your Honor.

13 THE COURT: All right. So lost the other one, you
14 won that one. That's how these things work out.

15 So the ninth ordered paragraph we're now on the
16 objection number 6.

17 MR. KLESTADT: Your Honor, that objection was to a
18 prior draft of the order that the reference to an automatic
19 dismissal of the case is not in our order.

20 THE COURT: All right. So is that resolved to
21 your satisfaction, Mr. Castro?

22 MR. CASTRO: I believe so, yes.

23 THE COURT: All right. So the seventh paragraph
24 talks about the tenth ordered paragraph about claims for
25 damages, which I think has been already addressed in

1 connection with the \$700,000. Am I correct about that?

2 MR. KLESTADT: Well -- just bear with me, Your
3 Honor.

4 THE COURT: Sure. I mean we'll have further
5 proceedings.

6 MR. KLESTADT: I have to count tenths. The tenth
7 ordered paragraph is now the notice of pendency removal. So
8 I'm not sure which paragraph he was looking for.

9 THE COURT: Mr. Castro, can you help us out and
10 let me know where --

11 MR. KLESTADT: Oh, maybe it's the thirteenth one,
12 the bottom of page 5.

13 THE COURT: Oh, nothing in this herein or in the
14 memorandum decision --

15 MR. CASTRO: That's it.

16 THE COURT: -- shall be deemed an adjudication of
17 the issue of damages.

18 All right. Is that -- was that an objection to
19 that language or --

20 MR. CASTRO: Yes, Your Honor.

21 THE COURT: Okay. And what's the -- what's the
22 objection to that language? It basically says nothing in
23 this order deals with damages and parties reserve their
24 rights. So what -- what conceivable objection could there
25 be to something that prejudices no party in any way?

1 I suspect that your objection is to a prior
2 iteration of that paragraph and it's been changed to reserve
3 everyone's rights.

4 MR. CASTRO: No, I'm specifically discussing the
5 issue of damages.

6 MR. KLESTADT: Your Honor, in the next --

7 MR. CASTRO: I think what I was saying is that
8 instead of being in this order that this is something that
9 we can discuss in some kind of status conference to see what
10 we're going to do.

11 MR. KLESTADT: Your Honor, page 6 at the top of
12 the page there's a paragraph that says, "Please schedule a
13 status conference."

14 MR. CASTRO: Right.

15 THE COURT: I don't see anything objectionable
16 about the paragraph at the bottom of page 5. It says
17 nothing in any -- in this order or the memorandum decision
18 adjudicates the issue of damages from the breach. I think
19 that's essentially a reservation of rights. And then it
20 goes on to say and quote, "All parties reserve their rights
21 to subsequently seek such an adjudication," which I think is
22 also appropriate. And the next paragraph sets a status
23 conference --

24 MR. CASTRO: That's fine, Your Honor.

25 THE COURT: -- on the matter. All right.

1 MR. CASTRO: That is fine.

2 THE COURT: All right. So --

3 MR. CASTRO: I have one other issue, Judge.

4 There are other payments, for example, on the
5 mortgage, and I've raised that issue earlier. We, on behalf
6 of SC and Seth Miller, had requested a payoff letter from
7 Mr. Tillow. Initially we were told that we were not
8 entitled to it, then we were told that the numbers are
9 attached to Exhibit B of the proposed order.

10 THE COURT: Well you said a payoff letter from
11 Mr. Tillow?

12 MR. CASTRO: On the mortgage so we know exactly
13 what's due.

14 THE COURT: Oh, all right. Mr. Tillow is not --

15 MR. CASTRO: Because that's --

16 THE COURT: -- a part -- well --

17 MR. CASTRO: It's an item that has to be paid at
18 the closing.

19 THE COURT: All right.

20 MR. LOBELLO: Your Honor, if I may heard on that?

21 MR. CASTRO: May I finish? May I finish?

22 THE COURT: Sure. I think you were finished, so
23 I'm going to hear from him and then I'll hear from you
24 again.

25 MR. CASTRO: I'm not finished. Okay.

1 THE COURT: Mr. Castro you're making an already
2 difficult case even more difficult.

3 I would note that what you're talking about now --
4 I'm giving you some latitude -- it's not in your objection,
5 it's not in your subsequent memorandum on these issues. So
6 it's a freebie.

7 So at this point I'm going to hear from
8 Mr. Tillow's attorney, who's not even a party to the
9 bankruptcy. So it's very unclear that I have any
10 jurisdiction over him at all.

11 MR. LOBELLO: Your Honor, I'll be brief.

12 I just wanted to be -- I had provided a payoff
13 statement on October 7th and that was part of the submission
14 to Your Honor. It was Exhibit B to Mr. Binder's proposed
15 order. So that's been floating out there for 30 days and
16 it's a detailed statement as to what the first mortgage
17 holder is due, and we've been patiently waiting for two
18 years for our money.

19 I'd like it clear that there is no dispute with
20 respect to this. I only heard from Mr. Castro yesterday
21 saying geeze, I'd like some detail. Well this has been out
22 there for 30 days, I really don't want to prolong this. I
23 think that we're entitled to the monies that are listed in
24 our schedule.

25 And in addition since the closing may -- is going

1 to spill out into the future, originally the closing we
2 anticipated would be October 31st, all right, wanted it to
3 be very clear that obviously the per diem interest rate that
4 is set forth in Exhibit B obviously continues to accrue.

5 THE COURT: You've decided not to spin your wheels
6 as the parties try to get all the other pieces ready to go.

7 MR. LOBELLO: Yes, Your Honor.

8 THE COURT: That's a more than fair position I
9 think.

10 So is there any reason we can't work off of that
11 statement and then update it for purposes of what your
12 client needs?

13 MR. CASTRO: One reason, Your Honor. We have no
14 -- obviously no objections with the principal amount, the
15 interest payments, these things they are what they are. And
16 as I said, I had requested a payoff letter, which is
17 normally done when you do a closing. They give you a
18 statement, what's owed so that you know at the closing how
19 much is due.

20 THE COURT: But he doesn't even know what the
21 closing date is, so --

22 MR. CASTRO: I understand, but if we have a per
23 diem we can work that out.

24 But, for example, Exhibit B, which was attached to
25 the order, I didn't know where that information came from.

1 There's 102,000 for legal fees and accounting fees and
2 another \$3,500 for legal fees.

3 THE COURT: And that is all dealing with
4 Mr. Tillow.

5 MR. CASTRO: Yes.

6 THE COURT: All right.

7 MR. CASTRO: And that's why I wanted a breakdown
8 of these things so that we know exactly what they're seeking
9 and whether or not they're appropriate.

10 Now I can tell you that the mortgage as my reading
11 of it does not provide for accounting fees. And my reading
12 of that mortgage also does not provide for legal fees. So
13 that's an issue that has to be resolved.

14 And the reason we're raising it, just so that we
15 know exactly what's due at the closing.

16 THE COURT: I tell you your client -- the hallmark
17 of your client's actions is not reasonableness, because all
18 this is stuff that should be discussed and worked out. And
19 the fact that every single thing is the subject of dispute
20 really does not bode well for your client's actions in this
21 case, which is consistent with my liability finding.

22 But let me hear from Mr. Tillow.

23 MR. CASTRO: Your Honor --

24 THE COURT: And I'm not -- I will warn you now I'm
25 hearing all this stuff but I am going to have a very, very

1 short fuse for getting this closing done. It has taken a
2 long time to get to this point, we had a trial, somebody
3 won, somebody lost.

4 The idea of criticizing Mr. Tillow who's
5 essentially collateral damage in this case waiting around
6 until the other two parties to the transaction has gotten
7 their act together just strikes me as a bit beyond the pale,
8 because I think at this point all Mr. Tillow gets out of
9 this is the ability to pay his attorney.

10 So let me hear -- so I'm going to be very
11 sympathetic to Mr. Tillow's desire not to gin up on a
12 regular basis, new payoff letters, new information for a
13 closing that has not yet been set.

14 So I'm assuming that as we get closing to an
15 appropriate date that such information will materialize.

16 MR. LOBELLO: Your Honor, the -- Mr. Castro
17 indicated that the mortgage does not provide for
18 professional fees, and I've never seen a mortgage that
19 didn't provide for professional fees. And quite frankly
20 this mortgage also does provide for professional fees.
21 "Mortgagor must pay all expenses of mortgagee, including
22 reasonable attorneys' fees if mortgagee is made a party in a
23 suit relating to the property" -- which I think that this
24 Chapter 11 case really has been - "or mortgagee sues anyone
25 to protect or enforce mortgagee's rights."

1 So I -- I echo the Court's sentiment, I think it's
2 preposterous that my fee might -- Mr. Tillow's fees for
3 really not being all that aggressive. We didn't come in to
4 make a motion for bad faith filing, we didn't make a motion
5 to lift the stay, we tried to let the parties work out the
6 issues themselves. We did have to incur certain expenses to
7 get an adequate protection stipulation to make sure the
8 property was inspected, to make sure there was insurance, on
9 and on and on and on.

10 So I really don't think it's fair that
11 Mr. Tillow's fees are being questioned at this stage
12 especially on the eve of the hearing when this October 7
13 payoff statement, which had that number, is in everyone's
14 possession for 30 days.

15 THE COURT: All right. Mr. Castro?

16 MR. CASTRO: Your Honor, let me be clear. This
17 was an Exhibit B to an order. I did not know where this
18 information came from. And I specifically requested a
19 payoff from Mr. Tillow, which is traditional on a closing.
20 The response that I got was a letter, and I'd like to hand
21 it up if I may, saying --

22 THE COURT: I don't want it.

23 MR. CASTRO: But let me tell you what it said. It
24 said that SE Opportunity and Mr. Seth Miller are not
25 entitled to a payoff letter and that our request was

1 rejected.

2 Now when I got this and I spoke with Mr. LoBello I
3 didn't come --

4 THE COURT: I suspect your client has engendered a
5 certain amount of hostility from all other participants in
6 this transaction and that some of that hostility is coming
7 back at him in the form of a lack of cooperation at this
8 point. That doesn't advance the ball.

9 So I mentioned getting this transaction done, but
10 you know, that's -- that's what your mother would say, you
11 reap as you sew. So your client really should -- should be
12 aware of that.

13 MR. CASTRO: But --

14 THE COURT: My first question is you got up and
15 said he's not entitled to attorneys' fees. He got up and
16 read me something from the mortgage saying he is.

17 MR. CASTRO: Your Honor, the mortgage says they're
18 entitled to --

19 THE COURT: No, he just read it to me. So do
20 you --

21 MR. CASTRO: I understand, but we -- I disagree
22 respectfully that the filing of this bankruptcy created
23 litigation that would -- that triggered that provision. I
24 disagree with it and Your Honor can disagree with me, but
25 it's an issue --

1 THE COURT: I do.

2 MR. CASTRO: -- that I'm raising with the Court.

3 THE COURT: Based on what -- based on what I just
4 heard litigation regarding the property, this entire case
5 has been about one thing and one thing only, the property.

6 MR. CASTRO: And then accounting fees are not
7 something that are recoverable either, and there's no
8 breakdown in that 102,000 figure as to what's what. And
9 that's all I requested, a breakdown.

10 THE COURT: All right. I would ask that
11 Mr. Tillow's counsel provide a breakdown of what the
12 professional fees are, to the extent you haven't done that
13 already, and I think you're titled to that.

14 MR. CASTRO: Your Honor, let me just make --

15 THE COURT: But I will say at the rate we're going
16 the meter is running. So every hearing, and I suspect this
17 may not be the last hearing, although I fervently hope that
18 it is. So we'll see. So I would imagine Mr. Tillow's
19 counsel and Mr. Tillow has not been anxious to run those
20 numbers until he knows all this is done.

21 MR. CASTRO: Your Honor, let me just make a
22 statement.

23 I've had maybe three or four conference calls
24 with counsel trying to resolve these issues. We didn't come
25 in here without making that attempt.

1 The issue of the transfer tax in my opinion is a
2 legitimate issue, Your Honor. And I want to let you know
3 that I spoke with First American yesterday, the
4 representative said --

5 THE COURT: Why are going backwards? Do we --

6 MR. CASTRO: Because you're making -- you made a
7 statement that my client is somehow doing this in an
8 nefarious manner. It's a legitimate issue --

9 THE COURT: I am making the statement that your
10 client has not operated in the past in good faith, I so
11 found after a trial and after listening to your client sit
12 in that very witness stand.

13 MR. CASTRO: I understand.

14 THE COURT: And I am saying that based on what I'm
15 hearing today your client appears to be the kind of person
16 who decides to make every argument, period.

17 There's some arguments that you raised that are
18 very reasonable about the \$700,000 and there's been no
19 finding of damages.

20 But I got to say as your attorney you can tell him
21 that I said that he should take your advice to get out of
22 dodge at the right time and not nitpick about some things
23 that I've got to say really undermine the position of your
24 client entirely.

25 MR. CASTRO: I agree with you, but --

1 THE COURT: Such as coming in and saying he's not
2 entitled to attorneys' fees based on what I just heard from
3 the document, and the fact that I will take -- certainly
4 I'll make the finding right now based on Mr. Tillow's
5 participation I was wondering how much I would see of
6 Mr. Tillow or not in this case, and I thought Mr. Tillow's
7 counsel did an excellent job of straddling that line and
8 being here to protect his rights, but not running up the
9 meter and did not actively participate in a way that I
10 thought was over the top.

11 So I don't want to talk about characterizations,
12 I'm trying to essentially warn your client that at a certain
13 point I'm going to start attaching fees and other
14 consequences if I perceive that this closing does not
15 proceed as is required by my decision.

16 You want to appeal the decision great, that's
17 entirely your right, but until then it stands, and absent a
18 stay it will go forward.

19 So I ask you send that message to your client,
20 because there's some serious issues here that shouldn't be
21 in front of me because they should be something that could
22 be worked out.

23 MR. CASTRO: Your Honor, I hear you, I will
24 certainly pass the message. But I want you to understand
25 one thing. The issue, for example, of the transfer tax, I

1 spoke with the representative, he said they have to review
2 it based upon the information that I gave him. And my only
3 point is obviously if that amount is due we will pay it.
4 It's currently being reviewed by First American as we speak.
5 And all I --

6 THE COURT: I already ruled on First American.

7 MR. CASTRO: I understand.

8 THE COURT: I don't want to hear --

9 MR. CASTRO: I wanted you to understand where we
10 come from on that issue.

11 THE COURT: I understand it, I have a set of
12 objections and I have a set of papers you filed yesterday.
13 I have read them all. I made a ruling about First American,
14 I'm not going backwards.

15 So I believe I've gone through all the objections
16 to the proposed order and then looking at defendant SE
17 Opportunity Fund and Seth Miller's prehearing memorandum of
18 law that's at docket number 25, that I think safely can be
19 characterized as all dealing with the \$700,000 deposit.

20 MR. CASTRO: Correct.

21 THE COURT: I agree with you, that money will be
22 held in escrow.

23 So those are my rulings. I'd ask that a modified
24 order be submitted to my chambers and I will enter it as
25 soon as I get it if it's consistent with my rulings.

1 Anything else that we need to address here today
2 other than a date for any other proceeding about damages or
3 is that premature?

4 MR. KLESTADT: It's not premature, Your Honor. I
5 think that it would be appropriate to set a date at least
6 for a status conference, and --

7 THE COURT: All right. How far out?

8 MR. KLESTADT: May I have a moment, Your Honor?

9 THE COURT: Sure.

10 (Pause)

11 MR. KLESTADT: Your Honor, some time in early
12 February? So the assumption that we'll close the
13 transaction and then come back to you.

14 THE COURT: All right. Let's make it February 4th
15 at 10 a.m., if that works for Mr. Castro and any other
16 interested party.

17 MR. CASTRO: It will work.

18 THE COURT: So I will -- that date can be filled
19 in in the order --

20 MR. KLESTADT: February 4th at 10 o'clock, Your
21 Honor?

22 THE COURT: Yes.

23 MR. KLESTADT: Thank you.

24 THE COURT: And so is there anything else that
25 needs to be addressed today for purposes of entering this

1 order?

2 MR. KLESTADT: I think that's everything, Your
3 Honor.

4 THE COURT: All right. So please submit a revised
5 copy to chambers as well as obviously a copy to all the
6 other interested parties at the same time. I don't think
7 the order changed a whole lot so there shouldn't be anything
8 new in connection with that.

9 MR. KLESTADT: Thank you very much, Your Honor.

10 THE COURT: Thank you.

11 MR. CASTRO: Thank you, Your Honor.

12 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

13 (Whereupon these proceedings were concluded at 10:53
14 AM)

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C E R T I F I C A T I O N

I, Dawn South, certify that the foregoing transcript is a
true and accurate record of the proceedings.

Dawn
South

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